82-1321

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KASE HIGA, JUDGE OF THE SECOND CIRCUIT
STATE OF HAWAII, *Petitioner*,

v.

RORY MAYO, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Double Jeopardy clause of the Fifth Amendment bars retrial of a state defendant where the trial court declares a mistrial sua sponte because of "a commendable concern that the impartiality of the proceedings be unimpeached."

2. Whether a criminal defendant may successfully invoke the Double Jeopardy clause where his own conduct in offering a gift to the trial judge brought about the court's sua sponte mistrial ruling.

LIST OF PARTIES AFFECTED

Except for the persons listed in the caption, there are no other parties affected by this case.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner KASE HIGA, Judge of the Second Circuit, State of Hawaii, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Ninth Circuit in the above case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is attached to this Petition as Appendix A. That decision affirmed the judgment of the District Court for the District of Hawaii, published as *Mayo v. Attorney General*, 528 F.Supp. 883 (1981) and attached hereto as Exhibit B.

The decision of the Hawaii Supreme Court in *State v. Mayo*, 62 Haw. 108, 612 P.2d 107 (1980) is attached hereto as Exhibit C.

JURISDICTION

The final judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 9, 1982.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fifth Amendment.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Respondent was indicted for the offenses of Rape and Kidnapping by the Maui grand jury, and trial was set for April 2, 1979, before the Honorable S. George Fukuoka in the Circuit Court of the Second Circuit. On the morning of April 2, 1979, before trial had commenced, the judge called both attorneys into chambers for the following reported conference:

> THE COURT: Okay now, this has to do with a case that's going to trial this morning: Rory Mayo's case. I just remembered it. I'd almost forgotten about it; but I just want to disclose to Counsel about a fact. About

a month or two ago, I don't even remember exactly the time, Rory Mayo and a woman friend came to my home to offer me something in a package as a gift. There was no explanation made other than they wanted to give me a gift, and, of course, I declined and said I was in no position to accept anything of that sort. And they kind of, you know, tried to persuade me to accept it, and I finally convinced them that I cannot accept it, and they left.

Now, I don't think it means anything very much but I thought I better let you people know. As a matter of fact, I thought about it this morning, and then I thought "Now, should I disclose it before the trial or after the trial?" and I decided I better do it before the trial, So that's it.

MR. LOWENTHAL: Has it affected your feelings at all about him or the case?

THE COURT: Well, I have feelings about it, but I don't think it will affect the case.

MR. LOWENTHAL: Okay.

THE COURT: Okay, anything else, so long as we're together?

Appendix B. No objections were made to Judge Fukuoka's hearing the case.

Following the in-chambers discussion, court was convened; the jury panel was sworn and a jury selected; opening statements were made; and the prosecution called two preliminary witnesses for testimony. During voir dire and opening statement by defense counsel it had been suggested that the Defendant Mayo would take the stand in his own defense.

The next day, prior to the scheduled time for reconvening the trial, the state requested another in-chambers conference at which it was made clear that if Defendant took the stand he would be cross-examined about the gift

he had offered to Judge Fukuoka. The following conference took place in the presence of Judge Fukuoka, the prosecutor, defense counsel, the clerk and reporter, and Judge Kase Higa, the other Maui Circuit Judge, who was summoned specially for the conference:

> THE COURT: Okay, the record would note, please, that Mr. LaFountaine and Mr. Lowenthal are present with me in chambers.
>
> Yes, Mr. LaFountaine, you asked for this meeting.
>
> MR. LAFOUNTAINE: I'd like to express our intentions at this time and the intentions on the part of the State, that when Rory Mayo, the Defendant testifies, which we've been informed that he will, we intend to cross-examine him in the area of his attempt to deliver something or some type of gift to your Honor, to the Judge of the case; and I want to inform the Court in advance of our intentions in that area.
>
> THE COURT: All right. Now —
>
> MR. LOWENTHAL: I would, of course, object to his offer to proof or offer, you know, to cross-examine on that area. It'll be irrelevant and immaterial in this case.
>
> THE COURT: Uh-huh. Well, I had earlier disclosed to the parties about the incident that happened one or two months ago. With the declaration of intentions on the part of Mr. LaFountaine; and Mr. Lowenthal, I believe has already expressed his intention to use Mr. Mayo, the Defendant as a witness in his own behalf; I find that it's going to be necessary that I, at this point, to disqualify myself from proceeding further with the trial, and will, on that basis call a mistrial.
>
> THE CLERK: Call a what?
>
> THE COURT: Mistrial. And the matter will be transferred down to Judge Higa's Court, courtroom number one.

MR. LOWENTHAL: I'd like the record to reflect that it is over my objection.

I would also like this aspect of the record, I take it, will be — will not be published.

THE COURT: Well, it's — not published now.

MR. LOWENTHAL: Right. Because I feel it certainly would prejudice my client should it appear in the newspaper tomorrow.

MR. LAFOUNTAINE: All I can say is they won't find about it from me.

THE COURT: Okay, so I'll inform the jury.

Appendix B.

The case was thereupon transferred to Judge Higa's calendar, and on June 7, 1979, he granted a motion to dismiss on double jeopardy grounds.

The Hawaii Supreme Court reversed on June 3, 1980, finding that there was "manifest necessity" for a mistrial and therefore no conflict with the prohibition against double jeopardy. *State v. Mayo*, 62 Haw. 108, 612 P.2d 107 (1980). See Appendix C. Petitioner was retried in 1980, but another mistrial was declared because of a hung jury. He was convicted of rape at a third trial and was awaiting sentencing when a habeas corpus petition was filed in the United States District Court.

The United States District Court granted relief under 28 U.S.C. § 2254, holding that manifest necessity for mistrial did not exist. *Mayo v. Attorney General*, 528 F.Supp. 833 (D. Haw. 1981). See Appendix B.

The United States Court of Appeals For the Ninth Circuit summarily affirmed in an order filed November 9, 1982. See Appendix A.

Your Petitioners now seek a Writ of Certiorari.

EXISTENCE OF JURISDICTION BELOW

The Respondent invoked the jurisdiction of the District Court below by a petition pursuant to 28 U.S.C. § 2254.

REASON FOR GRANTING THE WRIT

The Decisions Of The Ninth Circuit And The District Court Raise Important Questions Regarding The Interplay Between The Public Interest In Fair Trials Designed To End In Just Judgments And An Individual Defendant's Right To Have His Trial Completed By A Particular Tribunal; The Overturning Of A Unanimous Hawaii Supreme Court Opinion Also Raises Issues Of Federal-State Comity.

The state court trial judge made a sua sponte declaration of mistrial in direct response to a chain of events set in motion by Respondent's act of offering him a gift. As a result of the holdings of the District Court and Court of Appeals, the State of Hawaii has been deprived of a chance to bring Respondent to justice on the serious charge of rape and kidnapping.

If it is true that Double Jeopardy cases must turn upon their facts, then the underlying inquiry is necessarily whether, under the particular facts of any case, the trial judge abused his discretion. This is, of course, a truism echoed in virtually every case touching upon this issue, but it should sensitize the observer to the very real dilemmas that often arise during the often turbulent flow of a criminal trial. See, *e.g. United States* v. *Jorn*, 400 U.S. 470, 486 (1978). It is for this reason that the court in *Arizona* v. *Washington*, 434 U.S. 497, 511 (1978) chose to give maximum credence to the trial judge's discretion even though other options "might" have been effective:

> We recognize that the extent of the possible bias cannot be measured, and that the District Court was quite correct in believing that some trial judges might have proceeded with the trial after giving the

> jury appropriate cautionary instructions. In a strict, literal sense, the mistrial was not "necessary." Nevertheless, the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment.

Indeed, the court held that the decisions of the trial court are "entitled to special respect" in circumstances not unlike those at bar.

Rather than giving "special respect" to the trial court's evaluation of the case, the District Court and Court of Appeals ruled that the trial judge erred in not considering specific alternatives to declaring a mistrial. See Appendix B. Hawaii contends, however, that the mere existence of possible alternatives does not vitiate manifest necessity, provided that the record indicates that the trial court fairly considered the circumstances and acted reasonably and in the interests of justice. *Arizona* v. *Washington*, 434 U.S. 497 (1978); *United States* v. *Jorn*, 400 U.S. 470 (1971); *Gori* v. *United States*, 367 U.S. 364 (1967).

Unlike the judge in *United States* v. *Jorn*, *supra*, the Hawaii trial judge acted in good faith and in the interests of justice. Even the District Court conceded as much:

> Finally, this Court recognizes that *Judge Fukuoka's decision to terminate the trial was founded on a commendable concern that the impartiality of the proceedings be unimpeached.* As commendable as that motive was, there was a step the judge might have taken, short of declaring a mistrial, that would still have preserved the Petitioner's "valued right to have his trial completed by a particular tribunal." *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949).

528 F.2d at 838. (Emphasis supplied).

Such "commendable concern" is entitled to more weight than was accorded by the federal courts. The mere possibility that other remedies could have been utilized should not control.

It should have been recognized that the courts have uniformly allowed retrial when it is the action of the Defendant that provokes a mistrial. *Arizona* v. *Washington, supra*, looked to improper and prejudicial comments by defense counsel during opening statement, and the court found this sufficient to justify retrial. Where, also, defense counsel's conduct was so outrageous as to cause the trial judge to expel him from the trial and ultimately to declare a mistrial, retrial was proper. *United States* v. *Dinitz*, 424 U.S. 600 (1976). This was also acknowledged in Chief Justice Burger's concurring opinion in *Jorn:*

> I join in the plurality opinion and in the judgment of the Court not without some reluctance, however, since the case represents a plain frustration of the right to have this case tried, attributable solely to the conduct of the trial judge. *If the accused had brought about the erroneous mistrial ruling we would have a different case.*

Id. at 387-388 (Emphasis supplied).

The District Court seemed to look only to the "valued right to have his trial completed by a particular tribunal." *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949). As indicated before, this "valued right" must be seen in the context of *Wade*, which held as follows:

> . . . What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

More recently, the Supreme Court has reaffirmed the "competing and *equally legitimate* demand for public jus-

tice." *Illinois* v. *Somerville*, 410 U.S. 458, 471 (1973) (Emphasis added.) In this case, the first trial had hardly begun before it was terminated, and the burden upon Mayo of a second trial was minimal. The public's interest in bringing Mayo to justice is overwhelming.

Petitioner agrees nevertheless that the defendant's interest in having a single trial to conclusion is a right not to be taken lightly. What this record indicates, however, is an extreme solicitude toward the interests of both the defendant and the public. Petitioner believes that the necessity for a mistrial was indeed manifest, and that the ends of public justice would be defeated if Mayo could not be retried.

CONCLUSION

For the Foregoing reasons, this Petition For Writ of Certiorari should be Granted.

Dated: January 31, 1983, at Honolulu, Hawaii.

Respectfully submitted,

TANY S. HONG
Attorney General
State of Hawaii

JAMES H. DANNENBERG
Deputy Attorney General

COUNSEL OF RECORD
Attorneys for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDGMENT

No. 81-4678 DC CV 81-0352 SPK

RORY MAYO, *Petitioner-Appellee,*

vs.

ATTORNEY GENERAL, STATE OF HAWAII,

and

KASE HIGA, JUDGE OF THE SECOND CIRCUIT
STATE OF HAWAII, *Respondents-Appellants.*

Filed In The
United States District Court
District of Hawaii
Dec. 6, 1982

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APPEAL from the United States District Court for the District of HAWAII.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of HAWAII and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered November 9, 1982

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-4678 D.C. No. CV 81-0352 SPK

RORY MAYO, *Petitioner-Appellee,*

vs.

ATTORNEY GENERAL, STATE OF HAWAII,

and

KASE HIGA, JUDGE OF THE SECOND CIRCUIT
STATE OF HAWAII, *Respondents-Appellants.*

ORDER

(FOR PUBLICATION)

FILED
Nov. 9-1982
Phillip B. Winberry
Clerk, U.S. Court of Appeals

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Dept. of Attorney
General State of Hawaii
1982 Dec. 8, AM 9:53

Appeal from the United States District Court
for the District of Hawaii.
Samuel P. King. U.S. District Judge, Presiding
Argued and Submitted August 13, 1982

Before: SCHROEDER, FLETCHER and NORRIS, Circuit Judges.

The Judgment is affirmed for the reasons stated in the district court's opinion. *Mayo* v. *Attorney General, State of Hawaii*, 528 F. Supp. 833 (D. Haw. 1981).

APPENDIX B

UNITED STATES DISTRICT COURT,
D. HAWAII.

Dec. 14, 1981

Civ. No. 81-0352

RORY MAYO, *Petitioner*,

v.

ATTORNEY GENERAL, STATE OF HAWAII,

and

KASE HIGA, CIRCUIT JUDGE OF THE SECOND CIRCUIT STATE OF HAWAII, *Respondents*.

On defendant's petition for a writ of habeas corpus declaring his state court conviction for rape was obtained in violation of his rights under the double jeopardy clause of the Fifth Amendment to the United States Constitution, the District Court, Samuel P. King, Chief Judge, held that fact that defendant would be cross-examined by prosecution on alleged attempt to give trial court judge a gift did not make it manifestly necessary to terminate defendant's first trial in view of fact that any testimony elicited from defendant on cross-examination would have been inadmissible; thus, defendant's second and third trials, and his ultimate conviction, were in violation of his rights under the double jeopardy clause.

Writ granted.

Earle A. Partington, Schweigert & Associates, Honolulu, Hawaii, for petitioner.

James H. Dannenberg, Deputy Atty. Gen., Tany S. Hong, Atty. Gen., State of Hawaii, Honolulu, Hawaii, for respondents.

DECISION AND ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

SAMUEL P. KING, Chief Judge.

Petitioner Mayo seeks issuance of a writ of habeas corpus declaring his conviction for rape in the Circuit Court of the Second Circuit of Hawaii was obtained in violation of his rights under the double jeopardy clause of the Fifth Amendment to the Constitution of the United States [1]

This Court finds that the Petitioner has a valid claim under the Fifth Amendment and hereby grants his petition for a writ of habeas corpus.

FACTS

The Petitioner was indicted for the offenses of rape and kidnapping by a Maui grand jury on September 14, 1978. He pleaded not guilty and trial was set for April 2, 1979. On the morning of April 2, 1979, before trial had begun, the trial judge, the Honorable S. George Fukuoka, called counsel for the defendant and the state into chambers for the following reported conference:

> THE COURT: Okay now, this has to do with a case that's going to trial this morning: Rory Mayo's case. I just remembered it. I'd almost forgotten about it; but I just want to disclose to Counsel about a fact. About a month or two ago, I don't even remember exactly the time, Rory Mayo and a woman friend came to my home to offer me something in a package as a gift. There was no explanation made other than they wanted to give me a gift, and, of course, I declined and said I was in no position to accept anything of that sort. And they kind of, you know, tried to persuade me to accept it, and I finally convinced them that I cannot accept it, and they left.
>
> Now, I don't think it means anything very much but I thought I better let you people know. As a matter of fact, I

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[1] That amendment reads, in relevant part: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . .." U.S.Const.Am. V.

thought about it this morning, and then I thought "Now, should I disclose it before the trial or after the trial?" and I decided I better do it before the trial. So that's it.

MR. LOWENTHAL [defense counsel]: Has it affected your feelings at all about him or the case?

THE COURT: Well, I have feelings about it, but I don't think it will affect the case.

MR. LOWENTHAL: Okay.

THE COURT: Okay, anything else, so long as we're together?

Apparently no objections were made to Judge Fukuoka's sitting on the case.

Following this conference, the jury panel was sworn, voir dire was undertaken by counsel, opening statements were made and two prosecution witnesses were examined. After this, the trial was recessed for the day.

At some point during voir dire or opening statements, defense counsel stated that Mayo would be testifying in his own behalf during the trial.

The next day, before the reconvening of the trial, the state requested another in-chambers conference at which the prosecution advised the judge and defense counsel that, if Mayo were called, he would be cross-examined concerning the gift he offered to the judge. With Judge Fukuoka, the prosecutor, defense counsel, clerk and reporter, and Judge Kase Higa, the other Maui Circuit Judge, present, the following discussion took place:

THE COURT: Okay, the record would note, please, that Mr. LaFountaine [deputy prosecutor] and Mr. Lowenthal are present with me in chambers.

Yes, Mr. LaFountaine, you asked for this meeting.

MR. LAFOUNTAINE: I'd like to express our intentions at this time and the intentions on the part of the State, that when Rory Mayo, the Defendant, testifies, which we've been informed that he will, we intend to cross-examine

him in the area of his attempt to deliver something or some type of gift to your Honor, to the Judge of the case; and I want to inform the Court in advance of our intentions in that area.

THE COURT: All right. Now—

MR. LOWENTHAL: I would, of course, object to his offer to proof *[sic]* or offer, you know, to cross-examine on that area. It'll be irrelevant and immaterial in this case.

THE COURT: Uh-huh. Well, I had earlier disclosed to the parties about the incident that happened one or two months ago. With the declaration of intentions on the part of Mr. LaFountaine; and Mr. Lowenthal, I believe has already expressed his intention to use Mr. Mayo, the Defendant as a witness in his own behalf; I find that it's going to be necessary that I, at this point, to disqualify myself from proceeding further with the trial, and will, on that basis call a mistrial.

THE CLERK: Call a what?

THE COURT: Mistrial. And the matter will be transferred down to Judge Higa's Court, courtroom number one.

MR. LOWENTHAL: I'd like the record to reflect that it is over my objection. I would also like this aspect of the record, I take it, will be—will not be published.

THE COURT: Well, it's—not published now.

MR. LOWENTHAL: Right. Because I feel it certainly would prejudice my client should it appear in the newspaper tomorrow.

MR. LAFOUNTAINE: All I can say is they won't find about it from me.

THE COURT: Okay, so I'll inform the jury.

The case was then transferred to Judge Higa's calendar, and on June 7, 1979, he granted a defense motion to dismiss on double jeopardy grounds.

The Hawaii Supreme Court reversed this dismissal on June 3, 1980, holding that:

> . . . under the circumstances of this case, when it became reasonably clear to the trial judge that defendant intended to testify on his behalf and the State intended to cross-examine defendant on matters involving his participation in the purported gift to the trial judge, in order to attack defendant's credibility because evidence as to his identification was circumstantial, and there is reason to believe that the trial judge could be called as a witness, the trial court did not abuse its discretion in declaring a mistrial sua sponte as there was manifest necessity to do so.

State of Hawaii v. *Mayo*, 62 Haw. 108, 111, 612 P.2d 107 (1980).

In 1980, Mayo was retried, but a hung jury resulted. In 1981, a third trial ended in Mayo's conviction for rape.[2]

DISPOSITION

The Petitioner's suit comes before this Court under 28 U.S.C. § 2254, after Petitioner exxhausted all available state judicial remedies in conformance with that section.

This Court is thus presented with the question whether Petitioner's second and third trials and his ultimate conviction were in violation of the double jeopardy clause.

First, the double jeopardy clause has been held to apply to the states through the Fourteenth Amendment. *Benton* v. *Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). Therefore, if Mayo's conviction in state court contravened the strictures of that clause, the conviction cannot stand.

Second, jeopardy initially attached with the swearing in of the jury at the first trial. *See Green* v. *United States*, 355 U.S. 184, 188, 78 S.Ct. 221, 224, 2 L.Ed.2d 199 (1957). Absent a

---

[2] Petitioner testified at this third trial. The court granted a defense motion *in limine* to exclude evidence of the alleged gift because its prejudicial value outweighed its probative value.

valid reason for terminating the first trial, Mayo could not then be retried for the same offense.

When the trial judge declares a mistrial *sua sponte* over the defendant's objections, the determination whether there was a valid reason for ending the trial is governed by the manifest necessity test. *Arizona* v. *Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1977); *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165 (1824) (Story, J.) (first articulation of manifest necessity test).

During the past twenty years or so, there has been substantial judicial exegesis concerning the manifest necessity requirement. Most recently, the Supreme Court has described the test as follows:

> . . . Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. Yet in view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate "manifest necessity" for any mistrial declared over the objection of defendant.

Arizona v. *Washington*, 434 U.S. 497, 505, 98 S.Ct. 824, 830, 54 L.Ed.2d 717 (1977).

In other words, if there was no manifest necessity to terminate Mayo's first trial, then his subsequent trials and conviction violated the double jeopardy clause.

This Court finds that there was no manifest necessity to terminate Mayo's first trial.

First, there is considerable reason to believe that any testimony elicited from Mayo on cross-examination would have

been inadmissible. Rule 608(b) of the Hawaii Rules of Evidence states that:

> (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility. . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, *if probative of truthfulness or untruthfulness*, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, . . . (Emphasis added.)

Although Rule 608 was not promulgated until 1981, the Commentary to the rule indicates that the same principle applied in the common law at the time of Mayo's trial:

> Subsection (b): This allows cross-examination of the witness relative to specific collateral conduct *to the extent that such conduct is relevant to veracity. Such conduct may not be independently proved even if the witness expressly denies it.* Previous law was to the same effect, see *Territory* v. *Goo Wan Hoy*, 24 H. 721, 727 (1919), ...
>
> The rule also applies to any defendant who elects to testify. In *State* v. *Pokini*, 57 H. 17, 22-23, 548 P.2d 1397, 1400-01 (1976), the court observed: "[O]nce having taken the witness stand in his behalf, the defendant may be cross-examined on collateral matters bearing upon his credibility, the same as any other witness . . . . The defendant may be asked questions regarding his occupation or employment . . . *But there are obvious limitation beyond which the court may not allow the examiner to venture. The subject matter of inquiry must have some rational bearing upon the defendant's capacity for truth and veracity* . . .. And where the testimony sought to be elicited is of minimal value on the issue of credibility and comes into direct conflict with the defendant's right to a fair trial, the right of cross-examination into those areas must yield to the overriding requirements of due process. See *State* v. *Santiago*, 53 H. 254, 492 P.2d 657 (1971). . . .." (Emphasis added.)

From the preceding, it is evident that, were Mayo cross-examined, he could not have been questioned concerning his attempt to give Judge Fukuoka a gift, for such evidence would have no bearing upon the "defendant's capacity for truth and

veracity." At most, the prosecution would have been attempting to impeach the credibility of the defendant by bringing in evidence of the defendant's "bad acts." Such evidence is clearly inadmissible.[3]

Moreover, even assuming that the defendant might have been questioned concerning the attempted gift, the rule states flatly that no extrinsic evidence of that conduct would have been admissible. Any attempt to call Judge Fukuoka to testify concerning those events, therefore, would have been unsuccessful.[4]

Second, even if the rules of evidence permitted cross-examination concerning the attempted gift, the record indicates that it was far from certain that the judge would have been called upon to testify. Despite defense counsel's statements that defendant would testify, he was not required to do so and might actually have decided not to testify in the face of the prosecution's stated intention of questioning Mayo about his visit to the judge. More importantly, the judge appears never to have explored with counsel the probability that his testimony would be necessary. The defendant's willingness to

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[3] At the second in-chambers conference, counsel for defendant asserted that he would object to any effort to question the defendant concerning the attempted gift. At Mayo's third trial, such an objection appears to have been sustained.

[4] In addition, this Court believes there is reason to doubt whether the trial judge would have had to testify even if called. Rule 605 of the Hawaii Rules of Evidence declares that: "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." Although this rule was not promulgated until January 1, 1981, almost two years after Mayo's first trial, there is substantial authority to support the notion that a judge is incompetent to testify at a trial over which he is presiding. *See, e.g.*, Fed.R.Evid. 605, McCormick, Handbook of the Law of Evidence § 68, at 147 & n.77 & cases cited therein (2d ed. 1972). But *see* 6 Wigmore, Evidence § 1909, *esp.* n.5 & authorities cited therein (Chadbourn rev. 1976).

admit the attempted gift would have, of course, obviated the need for the judge's testimony. That Mayo would not have denied his visit to the judge seems likely, inasmuch as he would have exposed himself to a perjury charge by denying it.

Finally, this Court recognizes that Judge Fukuoka's decision to terminate the trial was founded on a commendable concern that the impartiality of the proceedings be unimpeached. As commendable as that motive was, there was a step the judge might have taken, short of declaring a mistrial, that would still have preserved the Petitioner's "valued right to have his trial completed by a particular tribunal." *Wade* v. *Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949).

Rule 25(a) of the Hawaii Rules of Penal Procedure, in effect at the time of Petitioner's trial, provides that, "[i]f by reason of . . . disqualification, the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial." Thus, it appears that Judge Fukuoka might simply have transferred the trial to another judge without having had to terminate the one before him. Such a procedure would have both effectively prevented any possible taint arising from the Petitioner's attempted gift and also would have made a mistrial unnecessary.

This Court is cognizant of the Supreme Court's command that review of a finding of manifest necessity be tempered by respect for the trial judge's exercise of his discretion, and that an explicit finding of manifest necessity by the trial judge "is not constitutionally mandated." *Arizona* v. *Washington*, 434 U.S. 497, 517, 98 S.Ct. 824, 836, 54 L.Ed.2d 717 (1977). Nevertheless, based on the preceding analysis, this Court finds that inadequate attention was paid at Petitioner's first trial to how the declaration of a mistrial would affect the double jeopardy rights of the accused (*Cf. id.* at 515-16, 98 S.Ct. at 835-36.), or to how a mistrial could be avoided, or to whether a mistrial was in fact necessary. Had these inquiries been undertaken, it

would have become apparent that no manifest necessity existed to declare a mistrial.

Under these circumstances, this Court finds and concludes that Petitioner's second and third trials, and his ultimate conviction, were in violation of his rights under the double jeopardy clause.

THEREFORE, IT IS HEREBY ORDERED THAT Petitioner Mayo's Petition for a Writ of Habeas Corpus is GRANTED AND A WRIT OF HABEAS CORPUS SHALL ISSUE AS PRAYED FOR.

APPENDIX C

SUPREME COURT OF HAWAII

Syllabus

STATE OF HAWAII, *Plaintiff-Appellant*,

vs.

RORY MAYO, *Defendant-Appellee*.

NO. 7447

APPEAL FROM SECOND CIRCUIT COURT
HONORABLE KASE HIGA, JUDGE

JUNE 3, 1980

RICHARDSON, C.J., OGATA, MENOR, LUM, NAKAMURA, JJ.

CRIMINAL LAW — *mistrial — double jeopardy.*

Where a mistrial is declared without the consent of the defendant, and there is an absence of manifest necessity for the mistrial, a retrial will be barred by double jeopardy.

SAME — *same — same.*

Under the circumstances wherein it became reasonably clear to the trial judge that defendant intended to testify on his behalf and the State intended to cross-examine defendant on matters involving his participation in a purported gift to the trial judge, in order to attack defendant's credibility because evidence as to his identification was circumstantial, and there is reason to believe that trial judge could be called as a witness, the trial judge did not abuse his discretion in declaring a mistrial sua sponte as there was manifest necessity to do so.

SAME — *trial court's discretion.*

The trial court's action will not be disturbed on appeal unless there has been a plain and manifest abuse of discretion.

PER CURIAM. The question to be determined by this court is whether defendant may be retried for rape in the first degree, § 707-730(1)(a), HRS, and kidnapping § 707-720(1)(d), HRS, in the face of defendant's allegations that a retrial would subject him to double jeopardy[1] because his first trial was "improperly terminated"[2] by the trial judge who sua sponte declared a mistrial upon the following undisputed facts.

Opinion Of The Court

On April 2, 1979, the first day of defendant's first trial, before the jury panel was sworn, the following colloquy took place in the judge's chambers:

> THE COURT: Okay now, this has to do with a case that's going to trial this morning: Rory Mayo's case. I just remembered it. I'd almost forgotten about it; but I just want to disclose to Counsel about a fact. About a month or two ago, I don't even remember exactly the time, Rory Mayo and a woman friend came to my home to offer me something in a package as a gift. There was no explanation made other than they wanted to give me a gift, and, of

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[1] Fifth amendment, U.S. Constitution, and art. I, § 10, Hawaii State Constitution.

[2] § 701-110 *When prosecution is barred by former prosecution for the same offense.* When a prosecution is for an offense under the same statutory provision and is based on the same facts as a former prosecution, it is barred by the former prosecution under any of the following circumstances:

. . . .

. . . .

. . . .

[4] *The former prosecution was improperly terminated.* Except as provided in this subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict. Termination under any of the following circumstances is not improper: (Emphasis added.)

course, I declined and said I was in no position to accept anything of that sort. And they kind of, you know, tried to persuade me to accept it, and I finally convinced them that I cannot accept it, and they left.

Now, I don't think it means anything very much but I thought I better let you people know. As a matter of fact, I thought about it this morning, and then I thought "Now, should I disclose it before the trial or after the trial?" and I decided I better do it before the trial. So that's it.

MR. LOWENTHAL: Has it affected your feelings at all about him or the case?

THE COURT: Well, I have feelings about it, but I don't think it will affect the case.

MR. LOWENTHAL: Okay.

THE COURT: Okay, anything else, so long as we're together?

Nothing else was said about the incident until after the State had called two witnesses and before trial resumed the following morning, when Mr. LaFountaine, the prosecutor, requested a conference and the following occurred:

THE COURT: Okay, the record would note, please, that Mr. LaFountaine and Mr. Lowenthal are present with me in chambers.

Yes, Mr. LaFountaine, you asked for this meeting.

MR. LAFOUNTAINE: I'd like to express our intentions at this time and the intensions on the part of the State, that when Rory Mayo, the Defendant testifies, which we've been informed that he will, we intend to cross-examine him on the area of his attempt to deliver something or some type of gift to your Honor, to the Judge of the case; and I want to inform the Court in advance of our intentions in that area.

THE COURT: All right. Now—

MR. LOWENTHAL: I would, of course, object to his offer of proof or offer, you know, to cross-examine on that area. It'll be irrelevant and immaterial in this case.

THE COURT: Uh-huh. Well, I had earlier disclosed to the parties about the incident that happened one or two months ago. With the declaration of intentions on the part of Mr. LaFountaine; and Mr. Lowenthal, I believe has already expressed his intention to use Mr. Mayo, the Defendant as a witness in his own behalf; I find that it's going to be necessary that I, at this point, to disqualify myself from proceeding further with the trial, and will, on that basis call a mistrial.

THE CLERK: Call a what?

THE COURT: Mistrial. And the matter will be transferred down to Judge Higa's Court, courtroom number one.

MR. LOWENTHAL: I'd like the record to reflect that it is over my objection.

I would also like this aspect of the record, I take it, will be — will not be published.

THE COURT: Well, it's — it's not published now.

MR. LOWENTHAL: Right. Because I feel it certainly would prejudice my client should it appear in the newspaper tomorrow.

MR. LAFOUNTAINE: All I can say is they wont' [*sic*] find out about it from me.

THE COURT: Okay, so I'll inform the jury.

In addition, during defense's opening statement, the jury was told that the defense intended to have defendant testify, and during oral argument before this court, defense counsel conceded he would have called defendant to testify because of the circumstantial aspect of the State's case against defendant's identify. The State likewise in its oral argument before this court concurred that it had a circumstantial case against defendant as to his identity.

Upon retrial, a defense motion to dismiss on grounds of double jeopardy was granted. The State appealed. We reverse.

The issue has been narrowed to whether there was an absence of manifest necessity for the sua sponte declaration of a mistrial by the trial judge. For we declared in *State* v. *Pulawa*, 58 Haw. 377, 569 P.2d 900 (1977), that "Where a mistrial is declared without the consent of the defendant, and there is an absence of manifest necessity for the mistrial, a retrial will be barred by double jeopardy."

The thrust of defendant's argument is that the trial court abused its discretion in failing to seek other alternatives before declaring a mistrial, and, therefore, the standard of manifest necessity was not adhered to by the trial judge. We disagree. We hold that under the circumstances of this case, when it became reasonably clear to the trial judge that defendant intended to testify on his behalf and the State intended to cross-examine defendant on matters involving his participation in the purported gift to the trial judge, in order to attack defendant's credibility because evidence as to his identification was circumstantial, and there is reason to believe that the trial judge could be called as a witness, the trial court did not abuse its discretion in declaring a mistrial sua sponte as there was manifest necessity to do so.

Syllabus

The trial court's action will not be disturbed on appeal unless there has been a plain and manifest abuse of discretion, *State* v. *Martin*, 56 Haw. 292, 535 P.2d 127 (1975).

John E. Tam (Ralph R. LaFountaine on the Opening Brief), Deputy Prosecuting Attorneys, County of Maui, for plaintiff-appellant.

Philip H. Lowenthal for defendant-appellee.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO. 82-1321

KASE HIGA, JUDGE OF THE SECOND CIRCUIT OF HAWAII

Petitioner,

vs.

RORY MAYO,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SCHWEIGERT & ASSOCIATES

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QUESTION PRESENTED FOR REVIEW

1. Whether the Double Jeopardy Clause of the Fifth Amendment bars retrial of a state defendant where the trial court declares sua sponte a mistrial absent any manifest necessity and where the mistrial is caused by the state for its sole benefit.

LIST OF PARTIES AFFECTED

Except for the persons listed in the caption, there are no other parties affected by this case.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO. 82-1321

KASE HIGA, JUDGE OF THE SECOND CIRCUIT OF HAWAII

Petitioner,

vs.

RORY MAYO,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Respondent RORY MAYO, respectfully prays the Petition for a Writ of Certiorari be denied with respect to the decision of the United States Court of Appeals for the Ninth Circuit in the above case.

OPINIONS BELOW

The opinions below are contained in the Petition for Writ of Certiorari (the Court of Appeals' decision herein is reported in 692 F.2d 595 (9th Cir.1982)).

JURISDICTION

The final judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 9, 1982.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fifth Amendment.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Respondent accepts Petitioner's Statement of the Case. However, it must be stated that the deputy prosecutor made no objection to the mistrial and offered no suggestion as to how it might have been avoided. Jeopardy had attached prior to the declaration of mistrial.

EXISTENCE OF JURISDICTION BELOW

The Respondent invoked the jurisdiction of the District Court below by a petition pursuant to 28 U.S.C. § 2254.

REASON FOR DENYING THE WRIT

THE DECISIONS OF THE NINTH CIRCUIT, THE DISTRICT COURT AND JUDGE KASE HIGA OF THE MAUI CIRCUIT COURT CORRECTLY RECOGNIZE THE ABSENCE OF MANIFEST NECESSITY, IN CONNECTION WITH THE TRIAL JUDGE'S DECLARATION OF A MISTRIAL OVER RESPONDENT'S OBJECTION, WHERE THE MISTRIAL WAS CAUSED BY THE STATE FOR ITS SOLE BENEFIT.

The District Court judge applied the so-called "manifest necessity" test to the facts in the instant case and held that no such showing was made in relation to the trial judge's sua sponte declaration of a mistrial over

Respondent's objection. The manifest necessity test was first articulated in United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824), and in Benton v. Maryland, 395 U.S. 784, 793-796 (1969), the double jeopardy clause of the Fifth Amendment was extended to cover state prosecutions such as the case here. And in Arizona v. Washington, 434 U.S. 497 (1978), the United States Supreme Court discussed the test where the defendant did not seek the mistrial as follows:

> . . . Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. Yet in view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate "manifest necessity" for any mistrial declared over the objection of defendant. [434 U.S. at 505.]

Can the State then sustain its heavy burden?

To answer this question one must first determine the "cause" of the mistrial in this case. The State argues that Mayo's alleged gift was the factual cause of the mistrial, and that Mayo should not be permitted to benefit from his own misconduct. This assertion just cannot withstand

analysis. A review of the cases shows us that mistrials are caused by (1) acts of or events involving a party, attorney, witness, juror, or judge during the trial, (2) omissions to act or disclose either during trial or immediately before trial by this same class of persons where there is a duty to act or disclose, or (3) a combination of these first two. Acts, events, or omissions to act or disclose days, weeks, or months before trial can never be the legal or proximate cause of a mistrial. Acts, events, or omissions to act or disclose days, weeks, or months before trial only set the stage upon which acts and events during trial and/or omissions to act or disclose during or immediately before trial cause in the legal sense a mistrial.

Applying this concept of "proximate" cause to the instant case one must look at the stage as it was set immediately before trial. Mayo had allegedly offered a gift to the trial judge a month of two before the trial, and the trial judge informed the parties prior to the trial commencing. Was there any duty to act or disclose by any party at this point? The answer is clearly yes if any party wished to disqualify the trial judge for any reason based on the alleged gift. Clearly this was why the trial judge informed the parties - so that a motion for disqualification could be heard. Both parties waived any right to disqualify the trial judge because of the alleged gift by failing to so

move when informed of the allegation. Then came the State's act, during trial after jeopardy attached, of advising the trial judge that the State wished to cross-examine the Respondent concerning the alleged gift. The argument that the State did not raise this matter sooner because it did not know prior to trial that Mayo would testify is totally fallacious for two reasons: (1) it is always foreseeable that a defendant might testify, and (2) if the evidence of the alleged gift was offered to show a guilty state of mind, such evidence would be admissible regardless of whether the defendant testified or not. Thus in this case, the legal or proximate cause of the mistrial was the combination of (1) the State's omission to object immediately before trial to the trial judge sitting and (2) the State's act in announcing during trial after jeopardy attached that it wished to cross-examine the Respondent concerning the alleged gift with the possibility that the judge might be called as a witness.

Secondly, it is helpful to determine who benefited by the mistrial. The State argues that the benefit test of Gori v. United States, 367 U.S. 364, 369 (1961), though subsequently rejected in United States v. Jorn, 400 U.S. 470, 483 (1971), should apply in this case and the retrials upheld because the mistrial was for Mayo's benefit. That test hinges on whether the "mistrial has been granted in the

sole interest of the defendant." This argument that the mistrial was for Mayo's benefit cannot be sustained. All parties agree that the trial judge is not a competent witness at a trial over which he presides. That "benefit" to Mayo always existed and the mistrial in no way altered that fundamental right or rule. The whole purpose of the mistrial was to give the State the opportunity to cross-examine Respondent concerning the alleged gift. No manifest necessity can exist in that situation. Downum v. United States, 372 U.S. 734 (1963); Cornero v. United States, 98 F.2d 69 (9th Cir.1931). This mistrial was solely for the benefit of the State. Thus, applying the test of Gori v. United States, supra, the State's argument collapses as it was the sole beneficiary of the mistrial.

Here the State in effect sought the mistrial to buttress a perceived weakness in its case. The State decided, after jeopardy had attached, that it needed to cross-examine in an additional area in order to make its case. As was said in Arizona v. Washington, supra, in discussing the high degree of manifest necessity for a retrial:

> The question whether that "high degree" has been reached is answered more easily in some kinds of cases than in others. At one extreme are cases in which a prosecutor requests a mistrial in order to buttress weaknesses in his evidence. Although there was a time when English judges served the Stuart monarchs by exercising a power to dis-

charge a jury whenever it appeared that the Crown's evidence would be insufficient to convict, the prohibition against double jeopardy as it evolved in this country was plainly intended to condemn this "abhorent" practice. As this Court noted in United States v. Dinitz, 424 U.S. 600, 611:

> The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad-faith' conduct by judge or prosecutor' . . . threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant.

Thus, the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused. [footnotes omitted.][434 U.S. at 507-708.]

As a matter of law, the State cannot, on these facts, sustain its burden of demonstrating manifest necessity because the mistrial was caused by the State for the benefit of the State. This is the very evil the double jeopardy clause was intended to prevent.

As several alternatives to a mistrial existed, all of which would have obviated the need for a mistrial, no manifest necessity existed for the mistrial. Five alternatives to a mistrial existed in this case. None were considered, and the State as the cause of the situation resulting in the mistrial offered no assistance to the trial judge. That alternatives to a mistrial must be at least considered was laid down in J. Harlan's plurality opinion in United States v. Jorn, supra:

> . . . For the crucial difference between reprosecution after appeal by the defendant and reprosecution after a sua sponte judicial mistrial declaration is that in the first situation the defendant has not been deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal. On the other hand, where the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his 'valued right to have his trial completed by a particular tribunal.' See Wade v. Hunter, 336 U.S. 684, 689 (1949)
>
> If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. Thus, where circumstances develop not attributable to prosecutorial or judicial over-

> reaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error. In the absence of such a motion, the Perez doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. See United States v. Perez, 9 Wheat., at 580.
>
> . . . Yet we cannot evolve rules based on the source of the particular problem giving rise to a question whether a mistrial should or should not be declared, because, even in circumstances where the problem reflects error on the part of one counsel or the other, the trial judge must still take care to assure himself that the situation warrants action on his part foreclosing the defendant from a potentially favorable judgment by the tribunal.
>
> . . . Yet, in the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate. [400 U.S. at 484-486.]

This requirement that all alternatives short of mistrial must be explored was discussed in United States v.

Grasso, 552 F.2d 46 (2nd Cir.1977), reh. den. 568 F.2d 899, vacated on other grounds 438 U.S. 901 (1978), and found to be the holding of Jorn (552 F.2d at 52, n. 2). Dunkerly v. Hogan, 579 F.2d 141 (2nd Cir.1978). And in Illinois v. Somerville, 410 U.S. 458 (1973), the United States Supreme Court stated:

> The determination by the trial court to abort a criminal proceeding where jeopardy has attached is not one to be lightly undertaken, since the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one. United States v. Jorn, supra. Nor will the lack of demonstrable additional prejudice preclude the defendant's invocation of the double jeopardy bar in the absence of some important countervailing interest of proper judicial administration. . . . [410 U.S. at 458.]

United States v. Pierce, 593 F.2d 415, 419 (1st Cir.1979).

Let us now look at these five alternatives:

1. The trial judge should have determined that the State waived its right to call him as a witness by failing to move to disqualify him when notified prior to trial of the alleged gift.

The basis for the State's argument that manifest necessity existed was the possibility that the trial judge might be called as an impeachment witness against Mayo when he testified. The nature of the evidence the trial judge would have given related to the alleged gift to him from Mayo. The question that must be asked is why there was

manifest necessity for a mistrial when the State was fully aware of the alleged gift prior to jeopardy attaching and no objection was made to the trial judge sitting? As the United States Supreme Court said in Wade v. Hunter, 336 U.S. 684 (1949):

> . . . There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such an event the purpose of the law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again. . . . [emphasis added.] [336 U.S. at 689.]

What was unforeseeable at Petitioner's trial? The answer is nothing! It is always foreseeable that a defendant might testify. Notwithstanding this, as well as the fact that the trial judge expressly raised the matter of the alleged gift in a pretrial conference, the deputy prosecutor remained silent until jeopardy attached before stating that the State wanted the trial judge as a State witness. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458 (1938). The deputy prosecutor had to know why the trial judge raised this matter, and he waived any objection the State might have to the trial judge sitting. This case is very much like Downum v. United States, supra, where the United States Supreme Court held that there was no

manifest necessity where the prosecutor allowed the jury to be selected and sworn even though one of its key witnesses was absent and had not been found. In the instant case, the Judge's disqualification is tantamount to absence. As a matter of law, manifest necessity cannot be found on these facts.

2. The trial judge could have requested that another judge rule on the admissibility of the evidence.

Had this been done and a ruling excluding the evidence obtained, the need for a mistrial would have been obviated. In fact, Mayo's counsel argued the inadmissibility of this evidence at the in-chambers conference before the mistrial was declared. The District Court below found that the evidence of the alleged gift was inadmissible in any circumstance as it had no bearing on Mayo's truth and veracity citing Rule 608 of the Hawaii Rules of Evidence, a codification of the common law applicable at the time of Mayo's first trial.[1] The suggestion that a gift of some lobster tails to a judge suggests a guilty state of mind is weak at best. At Mayo's third trial his motion in limine to exclude this evidence as being more prejudicial than probative was granted. This evidence was just not admissible in

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1. 528 F.Supp. at 836-838.

any case, and as such there was no reason for a mistrial.

3. The trial judge could have asked another judge to take over the trial.

As the District Court held:

> Rule 25(a) of the Hawaii Rules of Penal Procedure, in effect at the time of Petitioner's trial, provides that, "[i]f by reason of . . . disqualification, the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial." Thus, it appears that Judge Fukuoka might simply have transferred the trial to another judge without having had to terminate the one before him. Such a procedure would have both effectively prevented any possible taint arising from the Petitioner's attempted gift and also would have made a mistrial unnecessary. [528 F.Supp. at 838.]

The State relies on United States v. Lynch, 194 U.S.App.D.C. 213, 598 F.2d 132 (1978), as authority that a failure to resort to Rule 25 does not vitiate a finding of manifest necessity. This reliance is misplaced because in Lynch the other trial judges were requested to take over, but all stated they would be unable because of their own calendars. Further, already in that case numerous documents had been offered in evidence, 43 witnesses had been called, and any further delay even for a new judge to take over the

trial would have worked a hardship on the jury. Contrast that situation with the instant case where the trial had gone only one day and the other trial judge for the local circuit was present at the in-chambers hearing when the mistrial was declared.

4. The trial judge could have inquired whether Mayo would admit the incident in question.

Had the trial court made such an inquiry and Mayo admitted the circumstances of this alleged gift, there would have been no need for the trial judge or any other witness concerning the matter. Like the other alternatives, this was not considered.

5. The trial judge could have recessed the trial to seek a suitable alternative short of mistrial.

Had this been done, the Court and all parties would have had time to reflect on the problem and find an alternative to a mistrial. In United States v. Lynch, supra, this was done, and a mistrial was declared only after several weeks had passed without a suitable alternative to a mistrial being found. And in Dunkerly v. Hogan, 579 F.2d 141, 147-148 (2nd Cir.1978), a failure to consider this alternative precluded any finding of manifest necessity. Clearly, if the trial in the instant case had been recessed,

there would have been no mistrial.

Considering all of these alternatives, how then can it possibly be said that there was manifest necessity for a mistrial? The instant case is similar to United States v. Jorn, supra, where the United States Supreme Court said:

> . . . It is apparent from the record that no consideration was given to the possibility of a trial continuance; indeed, the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so. When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the sua sponte declaration of this mistrial. . . .[400 U.S. at 487.]

As in United States v. Starling, 571 F.2d 934, 941 (5th Cir.1978), the instant case ". . . reflects a total lack of awareness of the double jeopardy consequences of the court's action and of the manifest necessity standard," and, likewise, there was a crucial failure to consider Mayo's protected interest in having the trial concluded in a single proceeding.

This interest of a defendant was fully explored in Dunkerly v. Hogan, supra, where the availability of a rea-

sonable alternative (a brief continuance) to mistrial vitiated the finding of manifest necessity. There the Second Circuit said:

> . . . In the absence of any record evidence or statement by the court indicating why a short continuance would have been unreasonable, unfair, or impractical, we decline to speculate as to factors that the trial judge might possibly have considered, such as the 'freshness' of the evidence. On this record the declaration of a mistrial cannot properly be sustained, over appellant's objection, as having been required by a "high degree" of necessity.[footnote omitted.][579 F.2d at 148.]

United States v. Grasso, supra at 53.

In the instant case more than one alternative existed which would have been reasonable, fair, and practical. Nowhere from the record can it be inferred that the trial judge considered any of them,[2] and the State was just

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2. The State argues that the trial judge did not abuse his discretion sua sponte in granting a mistrial over defense objection. While it is true that many cases speak in terms of abuse of discretion as the standard of review on appeal, strictly speaking this is only true where a motion for mistrial is denied. United States v. Thomas, 632 F.2d 837, 841-844 (10th Cir. 1980). Where a mistrial is granted and then a motion to dismiss on the ground of double jeopardy is either granted or denied, the court on appeal is reviewing the propriety of that second ruling and the question is whether there was an error of law. Holiday v. Johnston, 313 U.S. 342 (1941). Where, as in the instant case, there is an appeal from the granting of a writ of habeas corpus, the standard of review is whether the decision of the District Court was "clearly erroneous." Stone v. Cardwell, 620 F.2d 212 (9th Cir.1980); Greenfield v. Gunn, 556 F.2d 935, 938 (9th

not interested. Now the State claims the right to a mistrial and retrial wherever it is known prior to trial that the judge is a potential State witness, but the defendant does not object to the judge sitting. Thus, the State can try its case once for free, and then turn around and do it again for real. This is exactly what the double jeopardy clause was intended to prevent.

CONCLUSION

This is a blatant case of the absence of manifest necessity for a mistrial. The double jeopardy clause is too important to be cast aside as easily as the Supreme Court of Hawaii did. The Petition for Writ of Certiorari by the

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Cir.1977). And here, where there is no factual dispute and the question is the application of the manifest necessity doctrine, purely a question of law, the rule in Sumner v. Mata, 449 U.S. 539 (1981), has no application. It is to be noted that the Hawaii Supreme Court erroneously applied the wrong standard to an error of law issue.

It is better to discard the "abuse of discretion" language because of the confusion it can cause and use the language of Arizona v. Washington, supra at 510, 514, that the trial judge's decision should be accorded great deference. The instant case is somewhat unusual in that the other local circuit judge, Judge Higa, who was present at the in-chambers conference in which the trial judge sua sponte declared a mistrial, was the judge who granted the motion to dismiss on the ground of double jeopardy. Clearly, if great deference must be given, it must be given to the decisions of both judges.

State is clearly without merit and must be denied.

DATED: Honolulu, Hawaii, April 25, 1983.

EARLE A. PARTINGTON
Attorney for Respondent

PROOF OF MAILING - AFFIDAVIT BY BAR MEMBER

I, Earle A. Partington, attorney for RORY MAYO, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 25th day of April, 1983, I deposited in a United States post office located in Honolulu, Hawaii, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

EARLE A. PARTINGTON
Attorney for Respondent

Subscribed and sworn to before me
this 25th day of April, 1983.

NOTARY PUBLIC, State of Hawaii

My Commission Expires: 3/4/85

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO. 82-1321

KASE HIGA, JUDGE OF THE SECOND CIRCUIT OF HAWAII

Petitioner,

vs.

RORY MAYO,

Respondent.

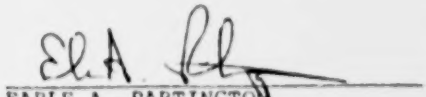
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, RORY MAYO, pursuant to Rule 46 of this Court and 18 U.S.C. §3006A(d)(6), asks leave to file the attached Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Respondent was represented by appointed counsel in the

Circuit Court and on appeal to the United States Court of Appeals for the Ninth Circuit.

DATED: Honolulu, Hawaii, April 25, 1983.

Respectfully submitted,



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